

**RICHARD P. METTKE -vs-
TOUCHNET INFORMATION SYSTEMS, INC.**

JOHN F. MURPHY, 6/16/98

BOWEN MOTTER REPORTING - (816) 421-2876



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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHEAST DISTRICT OF ALABAMA
3 EASTERN DIVISION
4
5 RICHARD P. METTKE,)
6 Plaintiff,)
7 vs.) No. 98-PT-596-E
8 TOUCHNET INFORMATION SYSTEMS,)
9 INC.,)
10 Defendant.)
11
12 THE DEPOSITION OF JOHN F. MURPHY, taken on
13 behalf of the Plaintiff June 16, 1998, at the law
14 offices of Spencer, Fane, Britt & Browne, 1400
15 Commerce Bank Building, 1000 Walnut, Kansas City,
16 Missouri.
17 A P P E A R A N C E S
18 For the Plaintiff: Tobor & Goldstein
19 1360 Post Oak Blvd., Ste 2300
20 Houston, Texas 77056-3023
21 By Mr. John T. Polasek
22 For the Defendant: Spencer, Fane, Britt & Browne
23 1000 Walnut, Suite 1403
24 Kansas City, Missouri 64106
25 By Mr. Richard P. Stitt

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1 S T I P U L A T I O N S
2 It is hereby stipulated and agreed by and
3 between the parties herein that presentment to the
4 attorneys of record of a copy of this deposition shall
5 be considered submission to the witness for his
6 signature within the meaning of Federal Rules of Civil
7 Procedure; but shall in no way be considered as a
8 waiver of the witness' signature, and is to be signed
9 at any time before the time of trial; and if not
10 signed by time of trial, may be used with the same
11 force and effect as if signed.
12
13
14 I N D E X
15 WITNESS: PAGE
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1 JOHN F. MURPHY,
2 a Witness, of lawful age, being produced, sworn and
3 examined on behalf of the Plaintiff, deposeth and
4 saith:
5 EXAMINATION
6 BY MR. POLASEK:
7 Q Mr. Murphy, would you state your name for the
8 record?
9 A John F. Murphy.
10 Q Mr. Murphy, have you been deposed before?
11 A No.
12 Q Okay. First time?
13 A Yes, it is.
14 Q Well, I am sure you have had an opportunity to
15 talk to your counsel today to discuss what we are
16 going to be doing here, but I think I will go
17 through a couple of the ground rules so to speak.
18 First, is that the court reporter just gave you
19 the oath. I will represent to you that it is the
20 same oath that you would take down at the
21 courthouse, meaning it has the same force and
22 effect as if you were testifying in front of the
23 judge. Do you understand that?
24 A Yes, I do.
25 Q Great. Second of all, in response to my

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1 questions, if you would, answer yes or no or give
2 an explanation as needed as opposed to a nod of
3 the head or uh-huh or a huh-uh.
4 A Okay.
5 Q Excellent. And if you need to take a break at
6 some point in the deposition, please let me know.
7 A Okay.
8 Q It is my understanding that you are an employee of
9 TouchNet Information Systems?
10 A Yes, I am.
11 Q Okay. How are you employed with TouchNet?
12 A My title is vice president of market development.
13 Q And what does the vice president of market
14 development do?
15 A I do a combination of deciding what markets we go
16 into. I sell into the markets and I help
17 determine strategy for what the company does.
18 Q And how long have you been in this position?
19 A This position, since I think 1992.
20 Q And prior to that, how were you employed with
21 TouchNet?
22 A I was hired in May of 1990 as marketing manager.
23 And my job as marketing manager was to help
24 determine what business we should be in and also
25 be a salesman to sell our solution.

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1 Q Are you from Kansas or Missouri?
 2 A I grew up in St. Louis. Moved to Kansas City 13
 3 years ago two days ago.
 4 Q Do you have a college degree?
 5 A I have a bachelor of science in business
 6 management from the University of Missouri,
 7 graduated 1985, emphasis in finance.
 8 Q Any postgraduate degrees?
 9 A No.
 10 Q I am going to show you what is marked as Exhibit 2
 11 and ask you if you have seen this document before?
 12 A Yes, I have.
 13 Q Okay. This is TouchNet's answer to interrogatory
 14 No. 1, correct?
 15 A Yes, it is.
 16 Q On page 5 of the interrogatory answer, you are
 17 listed as one having personal knowledge of the
 18 information in this answer. Can you tell me what
 19 information you supplied in responding to this
 20 interrogatory?
 21 A I supplied a copy of the videotape. I supplied
 22 letters that I had sent to BellSouth. I supplied
 23 invoices on the video production work and I think
 24 some other documents. →
 25 MR. STITT: Roll back a page.

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1 THE WITNESS: Billing invoice for VPR
 2 Creative Group. And, as I said, letters to
 3 BellSouth offering for sale our service.
 4 Q (By Mr. Polasek) Okay. On page 6 there's a
 5 verification. Is that your signature there?
 6 A Yes, it is.
 7 Q In Mr. Toughey's deposition that we just completed
 8 a few minutes ago, he testified that pay-as-you-go
 9 access to the internet was not available on
 10 TouchNet or, in fact, is still not available on
 11 TouchNet terminal. Do you agree with that?
 12 A I agree with that.
 13 Q He indicated that TouchNet has current plans to
 14 release or activate such a model in the very near
 15 future?
 16 A I agree with that.
 17 Q Within the next 30 days or so?
 18 A I don't know the timing.
 19 Q Do you know where this particular model will be
 20 utilized?
 21 A Primarily in airport locations.
 22 Q Do you have any models that are so equipped but
 23 not operating in place at the present time?
 24 A Yes, we do.
 25 Q Can you tell me where?

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1 A Oh, they are in airports across the country. For
 2 example, St. Louis Lambert International Airport,
 3 Orlando International Airport.
 4 Q Kansas City Airport?
 5 A In Kansas City we have kiosks operating, yes, but
 6 they do only pay-per-use fax services.
 7 Q And pay per use fax services is what TouchNet has
 8 been in for the past several years, correct?
 9 A Correct. We have done pay-per-use facsimile
 10 services really since 1989 and adding pay-per-use
 11 access to on-line services has really been
 12 available since I think the early '90s. And I
 13 know for a fact in 1992 and 1993 we had the
 14 capability of doing that.
 15 Q I would like for you to take a look at what has
 16 previously been marked as Exhibit 4. That is your
 17 affidavit.
 18 A Oh, right here.
 19 Q If you want to take a minute to look at that, I
 20 have some questions about some of the -- I have a
 21 few questions about the affidavit as well as some
 22 questions about the exhibits attached to it.
 23 A Okay. I'm ready.
 24 Q When did access to Prodigy become a service that
 25 was on the TouchNet terminal?

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1 A When was it --
 2 Q When was it first available for use by a user of
 3 the terminal?
 4 A I'm not sure when Prodigy was first available as a
 5 commercial on-line service. It could have been
 6 available on an earlier version of our software
 7 that would even be back in 1991. My first
 8 recollection of one of our kiosks showing Prodigy
 9 working on it was at a trade show in 1993.
 10 Q In May of 1993?
 11 A Yes. Because May of 1993, my recollection was at
 12 a SuperCom trade show in Chicago.
 13 Q Okay. And if you would take a look at the letter
 14 that is dated June 11th '92 and the attachments to
 15 that particular document, that seems to indicate
 16 that Prodigy access was available?
 17 A And the answer is yes, it would have been and yes,
 18 it was.
 19 Q Okay. Well, just a minute ago you testified that
 20 the first use on the terminal was in May of '93?
 21 A No.
 22 Q I am trying to understand.
 23 A I misunderstood the question. The Prodigy
 24 software has been available for access on the
 25 public terminals since 1992. The first time I

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<p>1 remember showing it at a trade show was in 1993. 2 That's the question I thought you asked. 3 Q When was it first placed on a TouchNet terminal? 4 A I don't recollect the exact date, but I know that 5 we had Prodigy in our office as a software in, 6 again, the early '90s. I would guess it would be 7 1992. 8 Q When you say we had it in the office, are you 9 talking about on your own PC or something at the 10 office as opposed to a terminal that was for use 11 by the average user on the street? 12 A Well, certainly we had it in our office as 13 something to be used by office personnel. And 14 that same software that we had in 1992 was 15 available to launch external programs, one of them 16 could have been Prodigy. 17 So the way I see it, we had Prodigy available 18 and Prodigy could have been launched by our 19 terminals. That is why we were offering to sell 20 it because we had the ability for launching 21 on-line services at that time. 22 Q Okay. Referring back to your June 11, 1992, 23 letter, I noted it is unsigned. 24 A Oh, this is my original copy. This is my copy of 25 it.</p>	<p>1 this letter, I sent the letter. 2 Q Okay. And how do you know that you sent the 3 letter? 4 A Because I wouldn't have a copy of it if I wouldn't 5 have had completed it and sent it. 6 Q Are you saying that you never retained working 7 drafts of letters? 8 A Correct. Normally I don't. That is why I have 9 very few copies, because most of my correspondence 10 was saved on computer hard drives. The fact that 11 I don't have a signed copy of this doesn't mean 12 that I didn't send it. In fact, I have an idea 13 why this might not be signed. I had a computer 14 modem, fax modem. It is possible that this was 15 faxed directly from my computer and then printed 16 out copy later. 17 Q Okay. If that is the sequence of events that did 18 occur, would you have some document, a hard copy 19 of a fax transmission report or something of that 20 nature? 21 A No, because if it went directly from my computer, 22 it would just be software sending this file out 23 and I -- then I printed the file out. I would 24 have printed the file out afterwards. 25 Q Is there any way to ascertain -- if that sequence</p>
Page 10	Page 12
<p>1 Q Do you have a copy of the signed original -- of 2 the signed letter? 3 A No, I don't. 4 Q Is there any way -- where did you get a copy of 5 this letter? 6 A From my files. 7 Q When you say your files, was it on your computer 8 files or was it in -- 9 A No. 10 Q -- correspondence file? 11 A It was in a paper file. This letter was written 12 in 1992, you know, on an old version of Windows on 13 a computer I don't have anymore on an old version 14 of Word that I don't have anymore. The originals, 15 you know, we have correspondence, you know, in my 16 job offering these things for sale to a lot of 17 people. I had a lot of correspondence. A lot of 18 that over the years has been thrown away. It just 19 so happened that I kept a file that had some 20 BellSouth things and I was able to find a copy 21 that I had sent. 22 Q Since it is unsigned, do you have any additional 23 documentation that would show that this letter was 24 actually sent to Mr. Funk? 25 A No, I don't. But if the question is did I send</p>	<p>1 of events did occur, is there any way to ascertain 2 whether Mr. Funk got a copy of the letter? 3 A Well, I think we probably could look at all the 4 history of long distance services to whatever his 5 fax number was in June of 1992. I would think 6 there would be a copy, there would be a record. 7 But I have no knowledge if he picked up the fax on 8 the other side of the fax machine, if he -- 9 Q Okay. I would like for you to take a look at the 10 next letter that is attached to your declaration. 11 That is a July 13, '92, letter? 12 A Correct. 13 Q The first line references Information Services 14 Gateway which is to be launched in Orlando. Do 15 you recall what that refers to? 16 A Yes, BellSouth. This is a subset of BellSouth, 17 this company, Linda Coyner worked for a division 18 of BellSouth that was going to be putting out a 19 service in Orlando that they were calling the 20 Information Services Gateway. That is my 21 recollection of it. 22 Q They were putting out a service? 23 A BellSouth was putting out -- they were putting out 24 enhanced fax services. If it wasn't BellSouth, it 25 was another company that was going to be doing a</p>

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1 trial of enhanced communication services in
 2 Orlando. This letter -- in fact, this one was
 3 obviously printed out because it is on our
 4 letterhead that I had sent -- I had sent her an
 5 article on the fact that I had seen that their
 6 service was going to be launched in Orlando and
 7 then I was saying that our services could be
 8 another add-on to their services.
 9 Q In addition to the services that they offered?
 10 A Correct.
 11 Q Okay. And the services that they were offering
 12 were fax services?
 13 A I think the services that they were offering were
 14 not only fax but also other messaging services.
 15 Q You mean e-mail?
 16 A I don't know if it was e-mail. I know that they
 17 were offering other messaging services. They were
 18 -- most of them were going to be telephony based.
 19 In fact, one thing I do remember they were going
 20 to offer was the ability of having all of your
 21 birth dates in a system and it would call you to
 22 tell you to remind you that there was a birthday
 23 coming up. Now, that's very small subset of my
 24 recollection of what the whole Information
 25 Services Gateway was.

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1 Q Okay. The third paragraph references or says
 2 that, "We also have the ability to work with you
 3 on offering a special interface, credit card, and
 4 billing structure for your customers. It makes no
 5 sense to have the capability of your platform and
 6 have people reluctant to use it because they don't
 7 understand the conventional pay fax purchase or
 8 are turned off by the high prices charged to
 9 access the services."
 10 The services that you are -- what services
 11 were you referencing there in that particular
 12 paragraph of your letter?
 13 A The specific service I was referencing there was
 14 they had a fax mailbox system. I don't recall the
 15 exact name of it, but they were going -- we had
 16 told them they could put out special cards, that
 17 there could be a billing system, that their users
 18 could go to any of our kiosks and insert their
 19 card, we could read the card, go into their
 20 network, which essentially was over the network
 21 that stored a file someplace and bring it -- that
 22 stored this fax image and bring it back as a file
 23 and be able to print it out.
 24 So specifically what I was talking about is
 25 we would be able to create an interface from our

1 kiosks that would be able to read a special card
 2 that would be like their billing card to be able
 3 to access this. And so we would be able to know
 4 from the card what they were currently using and
 5 what their mailbox was.
 6 Q Okay. That was to basically print a document that
 7 they had previously prepared?
 8 A Or a document that had been faxed to them. Or
 9 once we got into their intelligent messaging
 10 system to be able to access any service that they
 11 put out on.
 12 Q And TouchNet charged for that service? Would it
 13 charge for that service?
 14 A Well, we were trying to sell these to BellSouth.
 15 So BellSouth would have decided what they would
 16 have charged for the service. The capability of
 17 charging for the service existed. We had the
 18 ability of launching programs that had
 19 intelligence to go out and, you know, look at a
 20 card and validate not only credit card but other
 21 cards. And our customers really were in charge of
 22 deciding what they were going to do, how deep they
 23 wanted to validate it.
 24 Q All right. There's a handwritten note in the
 25 lower right-hand corner?

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1 A Uh-huh.
 2 Q It looks like your name signed below it?
 3 A Yes.
 4 Q Can you tell me what Funnybone fax is?
 5 A Funnybone fax was a fax template that was a
 6 service that we had on our machines that you could
 7 select from a selection of cards, personalize it
 8 by typing in the information and essentially print
 9 it out and then pay for it and then send the fax
 10 someplace else. Linda -- I think I printed out
 11 one that -- there is one I used to send quite a
 12 bit that showed that she was like the deal maker.
 13 And so what I did was I sent a printed one out to
 14 show her, this would be another service,
 15 pay-per-use service that we could offer that could
 16 be faxed.
 17 Q Do you recall when the spring '93 COMDEX show took
 18 place?
 19 A It was in Atlanta and it was either the first week
 20 of June of 1993 -- I could -- I know it was in
 21 Atlanta that summer, and I think it was in the
 22 first part of June. I could probably look here.
 23 Q I am glad you referred to it as that summer even
 24 though it is labeled the spring show.
 25 A Oh, well, that's not my choice of terms. COMDEX

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<p>1 chooses what they call their show. They had</p> <p>2 always called their fall show the fall show and</p> <p>3 then when we added spring it depended on when the</p> <p>4 date was available. It was at Georgia World</p> <p>5 Congress Center.</p> <p>6 Q But your best recollection is that it occurred in</p> <p>7 June of '93?</p> <p>8 A Correct.</p> <p>9 Q I asked Mr. Toughey in the deposition that we took</p> <p>10 earlier today if he could identify anyone that had</p> <p>11 received a copy of what we have marked as Exhibit</p> <p>12 5 for your reference. For your reference, Exhibit</p> <p>13 5 was the video that you, through your attorneys,</p> <p>14 have previously supplied to us. Can you give me a</p> <p>15 list of names of people that have received a copy</p> <p>16 of this video?</p> <p>17 A I do not have a list of names. Certainly when you</p> <p>18 are at COMDEX, there are hundreds of thousands --</p> <p>19 there is 200,000 people at the conference</p> <p>20 streaming by at all times that we were meeting</p> <p>21 giving them copies of our videotape. I don't have</p> <p>22 a sign up record or a distribution list, just like</p> <p>23 I don't have a list of everybody I have ever given</p> <p>24 a brochure to or a, you know, a piece of flier</p> <p>25 material.</p>	<p>1 A Yes.</p> <p>2 Q So that means that these terminals that were at</p> <p>3 the places you have listed in Paragraph 9 were in</p> <p>4 operation prior to May 14 of '93, correct?</p> <p>5 A Yes.</p> <p>6 Q Did those terminals have access to Prodigy?</p> <p>7 A To my recollection, yes.</p> <p>8 Q Did those terminals -- were you able to access the</p> <p>9 internet from those terminals?</p> <p>10 A My recollection at the time -- Prodigy did not</p> <p>11 have a gateway to the internet, because my</p> <p>12 recollection at that time, the internet was really</p> <p>13 only available on military bases and on college</p> <p>14 campuses. It was not a commercial -- it was</p> <p>15 before the world wide web. We were accessing</p> <p>16 Prodigy, though, which was an on-line network that</p> <p>17 had the ability of linking to whatever Prodigy had</p> <p>18 access to, and they had other services that could</p> <p>19 be accessed through Prodigy in 1990 -- the summer</p> <p>20 of 1993.</p> <p>21 Q So whatever services that Prodigy had access to,</p> <p>22 the user had access through the use of this</p> <p>23 terminal?</p> <p>24 A Yes.</p> <p>25 Q When did Prodigy gain an access to the internet?</p>
Page 18	Page 20
<p>1 Q Sure. Has this video, which has been marked as</p> <p>2 Exhibit 5, been given to people outside of the</p> <p>3 COMDEX shows?</p> <p>4 A My recollection is yes.</p> <p>5 Q Would you have a written record of whom -- of the</p> <p>6 people that you have given or that TouchNet has</p> <p>7 given a copy of this video to?</p> <p>8 A No, I don't. About all I can say to that is the</p> <p>9 majority of my correspondence was not printed out.</p> <p>10 It was on computer hard drives. You know, that</p> <p>11 was three operating systems and probably five</p> <p>12 computers ago. Maybe not the exact number, but</p> <p>13 certainly it would not make sense to go to the</p> <p>14 cost of making a videotape and not hand it out to</p> <p>15 anybody.</p> <p>16 Q In your affidavit, page 3, Paragraph 9, you refer</p> <p>17 to several places in which a TouchNet terminal was</p> <p>18 located and operating. Do you see that paragraph?</p> <p>19 A Yes, I do.</p> <p>20 Q As I understand that paragraph of your affidavit,</p> <p>21 terminals were located at the places so listed in</p> <p>22 here at the time that this video was prepared?</p> <p>23 A Yes.</p> <p>24 Q And the video has a date of production of May 14,</p> <p>25 1993?</p>	<p>1 A Oh, I don't know when Prodigy -- I don't know when</p> <p>2 Prodigy provided --</p> <p>3 Q Became a --</p> <p>4 A If you look at it this way, the internet is just</p> <p>5 -- the internet is a colloquial term that stands</p> <p>6 -- there is a protocol called TCP/IP and IP is the</p> <p>7 internet protocol that lets computers talk back</p> <p>8 and forth. In 1993, TCP/IP was not widely spread</p> <p>9 out. And so an on-line service like Prodigy used</p> <p>10 its own proprietary on-line communications</p> <p>11 protocol that we were able to use. But the fact</p> <p>12 that we were able to dial up and access Prodigy,</p> <p>13 if Prodigy would have used TCP/IP at that time and</p> <p>14 spent time on the internet, we would have used</p> <p>15 TCP/IP.</p> <p>16 Q If it had been available? Well, I mean, if the</p> <p>17 access had been available?</p> <p>18 A True. If Prodigy decided to have that be one of</p> <p>19 the pathways in. It is --</p> <p>20 Q Right.</p> <p>21 A I am not a Prodigy expert on their back-end</p> <p>22 architecture, but it wouldn't surprise me that</p> <p>23 Prodigy in some of their internal workings may</p> <p>24 have used TCP/IP to use data around a network,</p> <p>25 hence it would have been the internet as it was in</p>

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1 1993.

2 Q But that was not available to the users of one of

3 your terminals?

4 A Well, if the users of our terminal came up to use

5 Prodigy and they got Prodigy mail, I don't know

6 how Prodigy sent mail among the different systems,

7 it is very possible that in their backbone they

8 could have used the internet working protocol

9 TCP/IP. And if that is the case, they would have

10 been using Prodigy and using what at the time was

11 internet protocols.

12 Q Okay. You don't know if that was the case back in

13 May or prior to May of '93, which was when this

14 video was shot?

15 A Right. I don't -- right. I don't know the full

16 technical extent of Prodigy's backbone. It is

17 reasonable to assume that Prodigy on their

18 backbone used the same types of communications

19 that has evolved into the internet.

20 Q Do you recall meetings with personnel from Prodigy

21 in which TouchNet supposedly offered a

22 pay-as-you-use billing system for access to

23 Prodigy before it had access to the internet?

24 A I was not involved in any face-to-face meetings,

25 but I was involved in telephone conversations with

Page 22

1 Prodigy.

2 Q Were you involved in conversations in which

3 alternative billing systems were discussed?

4 A To my recollection, yes.

5 Q Well, specifically, do you recall discussing with

6 people with Prodigy a billing system in which a

7 user would insert his credit card into the

8 terminal and be billed on a per-minute basis per

9 his use or her use of the terminals access to

10 Prodigy?

11 A Right.

12 MR. STITT: Excuse me. Did you say

13 permanent basis?

14 MR. POLASEK: Per minute.

15 MR. STITT: Per minute. Excuse me. My,

16 such a deal.

17 THE WITNESS: The intent ultimately was

18 for Prodigy to have access on our machines and the

19 intent was for us to be able to sign up new

20 subscribers for Prodigy and for Prodigy users to

21 be able to use our machines and pay us the time

22 that they were using our machines to be able to

23 access the service for the trial. Because we

24 wanted to see if people would use this and we did

25 not want to scare them away, we did not charge the

Page 23

1 users to use the service.

2 Q (By Mr. Polasek) It was my understanding at the

3 time that you had subscribers, they were people

4 that were already subscribers to Prodigy?

5 A Meaning that could walk up and use the machine?

6 Q They could walk up and use the machine?

7 A Yes.

8 Q Or I guess access it from their own PC?

9 A Yes.

10 Q Okay. And were these discussions to the effect

11 that TouchNet was going to charge such people for

12 use of the TouchNet terminal while they are

13 accessing Prodigy on a per-minute basis?

14 A Yes. That goes back to our original design that

15 we could launch on-line services and have us as

16 owners of the machines be compensated for that.

17 Specifically for Prodigy, the discussions were

18 that for the trial period that Prodigy was

19 available on these machines, we would let people

20 access it for free.

21 Q Did you ever actually implement the system where

22 they were charged on a per-minute basis?

23 A No, we did not, but that was not to say that we

24 couldn't do it. It was -- you have to look back

25 to 1993. There was not many Prodigy members and

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1 it was a service, while available, it was not

2 commercially viable for us to be -- for users to

3 be doing it.

4 Q Do you recall any of the Prodigy people that you

5 had these discussions with?

6 A There was a man named Dennis Lostenberger

7 (phonetic), who is long since gone from Prodigy.

8 And there was another guy who left Prodigy during

9 the time that we were doing this. Again, you have

10 to put it in context. Prodigy has all of these

11 services. Prodigy -- we even had one up in

12 Canada. I mean, they were technically viable but

13 commercial failures.

14 Q And you are talking about accessing Prodigy or

15 iNet?

16 A I am talking about Prodigy in and of itself. The

17 fact is, we could access Prodigy, an on-line

18 service. The fact is we could charge for that

19 access. The fact is, we chose not to turn on the

20 charging during the trial.

21 Q Okay. Now, again, this is back before you could

22 access the internet from your terminal?

23 A Don't confuse the internet with Prodigy. The

24 internet is really just a communication protocol.

25 What we now term the internet -- when people say

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1 the internet, they really mean on-line services,
2 access to e-mail, access to information. That's
3 what we were doing on Prodigy. Now, the internet
4 just so happens to be using the internetworking
5 protocol IP you can get at web sites, you can get
6 at America On-Line, you can get at Prodigy, which
7 probably still exists in some format, but we
8 accessed what was commercially on-line available
9 in 1993.

10 Q But you were limited to what Prodigy had within
11 their library, so to speak?

12 A Correct. We were -- the service that we used, the
13 commercial on-line service was what Prodigy had,
14 that is what at the time we had on. If there was
15 another service that wanted to be on our system
16 that used the internet, as it were, to get mail or
17 other services, we could have done that also and
18 charged for it. The fact is we used Prodigy, and
19 Prodigy at the time used dial-up.

20 MR. POLASEK: Why don't we take a short
21 break for a few minutes. Let me look at some of
22 my notes.

23 (Whereupon, a break was taken.)

24 MR. POLASEK: I don't believe I have any
25 more questions at this time.

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1 THE WITNESS: All right.
2 EXAMINATION

3 BY MR. STITT:

4 Q Mr. Murphy, in your affidavit, I believe that is
5 marked as Exhibit No. 4, there are videos
6 referenced which were, according to your
7 testimony, distributed at the COMDEX convention.
8 Do you have any recollection of how many videotape
9 copies of Exhibit 5 were manufactured?

10 A My recollection is a box of them, you know, a box
11 that was big enough for me to carry to the trade
12 show. My recollection would be in the hundreds if
13 not more.

14 Q All right. Well, did you throw any of these tapes
15 away?

16 A It is -- I have no recollection of throwing tapes
17 away, but they were in our supply closet. And as
18 we grew as a company, this was not something that
19 we -- I guess I should say I don't know what
20 happened to whatever was left over from the trade
21 shows.

22 Q Okay. You have a guess of how many were left over
23 from the trade shows? Of the ones you took to the
24 spring COMDEX, how many did you come back with?

25 A I don't have a recollection, but I do remember

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1 giving out a lot of videotapes.

2 Q Would you say it is more than 20?

3 A Yes, more than 20.

4 Q More than 30?

5 A I would say myself, personally, I gave out
6 probably ten a day at the shows and there were
7 other people giving them out too. So while I
8 would have given out more than 30, I would guess
9 that the number given out by other TouchNet
10 employees would be, again, a wild guess. I would
11 think it would be over 100.

12 Q What kind of person were these given to? Were
13 they people who could purchase a kiosk if they
14 wanted?

15 A Correct. Generally, we wanted to give them to
16 prospects, not to people -- they were expensive
17 collateral material. We didn't hand them out to
18 anybody who wanted them. We handed them out to
19 somebody who we would hope would become a
20 customer.

21 Q All right. You have stated during your testimony
22 that TouchNet devised, installed on it Prodigy
23 software; is that correct?

24 A Yes.

25 Q Do you recall specifically whether or not during

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1 the negotiations with Prodigy that it was offered
2 to them optionally as a pay-per-use charge format?

3 A Specifically --

4 Q Is my question clear?

5 A Well, specifically, that was a decision that we
6 made because the machines were ours. Prodigy
7 wanted the software on our machines, and we made
8 the decision not to charge for the specific
9 access. We could have just as easily made the
10 decision to charge for it. And we told Prodigy
11 one reason we were interested in the relationship
12 was to help Prodigy sign up new members and for
13 TouchNet to generate usage revenue by having
14 access to Prodigy.

15 Q All right. Was it demonstrated to Prodigy that
16 pay-per-use option was available to them?

17 A Yes, it was.

18 Q Was the machine capable of putting that
19 pay-per-use charge into effect?

20 A Yes, it was. The software was designed to -- per
21 each application, it could have a payment amount
22 that could be charged by service or by minute or
23 by some minimum plus some other tick charge for
24 the Prodigy software. We chose essentially to put
25 in the price as zero.

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1 Q Let's turn to the internet now. If I want to sign
2 on to the internet by any computer, who will
3 charge me for that, for signing on to the
4 internet?

5 A If you wanted to have access to files that are on
6 other computers and you wanted to do it over the
7 so-called internet, you would get an account with
8 an internet service provider or you could open an
9 account with America On-Line or Prodigy or any
10 other on-line service.

11 Q So I can't sign on to the internet and have the
12 internet charge me for that service, can I?

13 A Correct. The internet is not a service. The
14 internet is colloquially known -- it is a series
15 of protocols that route messages across phone
16 lines to different computers.

17 Q In fact, the internet was initiated by the Central
18 Science Foundation, isn't it?

19 A Right. The history of the internet goes back to
20 the internetworking property called IP, which is a
21 protocol that networks of computers talk to other
22 networks of computers. It was developed for
23 military and educational institutions to share
24 data across different types of computers. The
25 internet -- now people think of the internet as a

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1 list of services and files and sites and
2 essentially those sites are on computers like they
3 always have been. They can still be accessed
4 using TCP/IP, but the internet is not a service.

5 Q It is not a -- the internet is not a pay-per-use
6 service, is it?

7 A No, it is not.

8 Q In fact, if I could get my computer to sign
9 directly on to the internet, I would be in
10 communication with nothing. Let me rephrase the
11 question.

12 A Yeah.

13 Q There is no one operating an internet to charge me
14 on a pay-per-use basis, right?

15 A I think what you are asking is -- huh. The
16 internet, right, is not a pay-per-use service.
17 You can pay a provider that you can log into their
18 computer that will let you send messages from or
19 get files from other computers.

20 Q And so the only service they can charge me when I
21 sign on on-line is a Prodigy or a CompuServe or
22 one of the entities that we have classified as an
23 ISP, internet service provider; is that correct?

24 A That is correct. If you as a consumer wanted to
25 have access to files on other computers over the

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1 internet, you would pay an ISP, internet service
2 provider, you would pay an on-line service to
3 provide you access. Persons at colleges, their
4 college already has a connection out to the
5 internet, so I suppose that they are paying a
6 tuition to the college which would, you know, have
7 that connection available.

8 Q And so, in fact, the internet is really just
9 another service option offered by an on-line
10 service such as Prodigy or CompuServe; is that
11 correct?

12 A If you log on to an on-line service like Prodigy,
13 you are using your computer to talk to Prodigy or
14 your computer to talk to AOL and you can get the
15 content that AOL or Prodigy has, but then you can
16 also link from the AOL or the Prodigy to content
17 that is stored on other computers, whether it is
18 somebody's web server, whether it is an FTP
19 server, whether it is a database stored someplace
20 else.

21 Q And you might link to those other computers
22 through the internet?

23 A Correct. You would use -- your computer talks
24 internetworking protocol which let's you get
25 information from a remote computer by typing in an

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1 address, whether it is IP address or whether it is
2 a name like www.touchnet.com.

3 Q Any content that I might want to access is
4 contained on individual web sites with respect to
5 the world wide web; is that a correct statement?

6 A Correct. Information is on computers out there
7 just like information was on Prodigy's computers.
8 Information is on, you know, company's computers
9 and you can use internetworking protocols to
10 access that data.

11 Q And so there is actually, with respect to the
12 routing computers which make up the internet, no
13 content on those computers; is that correct?

14 A Correct. Generally, the computers that route the
15 requests, their job is to route the requests in
16 packets of data to the computers that store the
17 data; the computer that stores the data then gives
18 it back and that data is routed through a network
19 of computers and that is what is known as the
20 internet.

21 Q Okay. Back in 1992 and '93, your computers, your
22 TouchNet kiosks were able to connect to Prodigy;
23 is that correct?

24 A Correct.

25 Q At that time, they couldn't connect to the

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1 internet through Prodigy because the internet
2 didn't exist; is that correct?
3 A The internet as we know it today was not -- the
4 internet as we know it today as an entity did not
5 exist. The internet in 1992 and 1993 generally
6 was used to transfer files between military bases
7 and universities and it used a bunch of different
8 protocols. So the public was not using the
9 internet in 1993. But it was just a matter of
10 time to be able to then have access to those
11 computers. I mean, it was -- our design was to be
12 able to access information anywhere it was stored.
13 Q The system that TouchNet had available in 1993
14 could connect to Prodigy, correct?
15 A Correct.
16 Q Is there any difference between the system
17 connecting to Prodigy in 1993 and the system
18 connecting through Prodigy and to the internet
19 today assuming Prodigy existed today?
20 A No.
21 Q There is no technical difference in the equipment?
22 A The equipment is the same, different protocols may
23 be used to be able to access the data that is
24 stored on other places.
25 Q And is the internet responsible for those

1 A The issue is providing access to data on other
2 computers requires some sort of networking
3 protocol. The internet -- there is no -- there is
4 no entity called the internet. The internet is a
5 collection of computers that can talk to each
6 other. What we do is we can provide pay-per-use
7 access to Prodigy in 1993 that could provide
8 access to data on other computers, essentially the
9 same thing that the internet -- what is now known
10 as the internet is.
11 Q So in your opinion, is there any difference
12 between this system TouchNet had operating in 1993
13 and how it functioned to connect to commercial
14 on-line services, including the internet if it
15 were available, as opposed to today when the
16 internet is available through Prodigy?
17 A No. I don't see any differences in the intent.
18 The only difference might be the protocols it
19 talked when it dialed up or what type of computer
20 -- what type of computer it dialed to. The
21 service, the access to information on an on-line
22 service that we had in 1993 is essentially the
23 same thing we have today.
24 Q But when you say there is a difference in how you
25 connect, wouldn't that be different for how you

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1 protocols?
2 A Well, the internet protocol has become the de
3 facto standard of how computers talk. So how we
4 talked to Prodigy in 1993 was a de facto standard
5 to talk to Prodigy in 1993. As TCP/IP became
6 widespread, that became the de facto way of
7 communicating among different systems. We had the
8 ability of talking to Prodigy and if Prodigy used
9 TCP/IP, we could have done it that way also.
10 Q With respect to using the internet, the only
11 entity that could charge you for a pay per use
12 service was an on-line service; is that correct?
13 A Correct.
14 Q The internet can't charge you itself?
15 A Correct.
16 Q There is no one operating it, the internet, as a
17 commercial entity to charge you for the service?
18 A Correct.
19 Q In fact, what you refer to as the internet is
20 merely just another connection mode that can be
21 accessed through your on-line service provider; is
22 that correct?
23 A Correct.
24 Q And you kind of shrugged there. Don't let me put
25 words in your mouth if you want to expand on that.

1 connect through Prodigy to Telnet to Gopher, is
2 that the difference you are referring to?
3 A Telnet and Gopher are services that were other
4 pre-world wide web services that were available
5 for computers that were using the internet. And
6 our service could have used those also. I'm not
7 sure I am answering --
8 Q Those services existed back in 1993?
9 A Yes, they did.
10 Q And you could have connected to those services
11 through Prodigy?
12 A If Prodigy had a -- if Prodigy had that available.
13 And I don't know for a fact that they did, but
14 they do now. And America On-Line does now. And
15 they are essentially a list of services that are
16 available to on-line users and on-line users can
17 use what people term the internet.
18 Q Just like they could have used Gopher or Telnet
19 back in '93?
20 A Yes.
21 Q It is just another means for connecting to these
22 different services; is that correct?
23 A Yes.
24 Q It is not a service in and of itself, the internet
25 that is?

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1 A Right. The internet is not a service.
 2 Q And there is no internet company to charge you on
 3 a pay-per-use basis for that service, is there?
 4 A Correct. There is no -- the internet is not an
 5 entity that charges.
 6 Q So today if somebody wanted to connect to the
 7 internet through a company like Prodigy or
 8 CompuServe, it is no different than it was in
 9 1993?
 10 A Correct.
 11 MR. STITT: I'm done.
 12 FURTHER EXAMINATION
 13 BY MR. POLASEK:
 14 Q Except to the extent that you couldn't connect to
 15 the internet in 1993 through Prodigy, correct?
 16 A I don't know that for a fact.
 17 Q Okay. Well, then when you say there is no
 18 difference, I mean, it is hard to say that in 1993
 19 there was no difference in accessing Prodigy and
 20 accessing the internet through Prodigy if you
 21 don't know that you could have accessed the
 22 internet through Prodigy in 1993?
 23 A Well, as I said earlier, Prodigy uses a lot of
 24 different -- I'm not an expert on Prodigy's
 25 back-end system, but Prodigy offered many services

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1 that included access to remote computers, it
 2 included access to airline tickets and shopping
 3 and e-mail. It included all of these things. And
 4 so Prodigy's computers had to talk to other
 5 computers and it's my -- it is my contention that
 6 they used services, internet protocol services to
 7 do that.
 8 Q But they were -- it is your testimony that they
 9 were able to talk to discrete or specified
 10 computers, OAG or the Kansas City newspaper or
 11 something of that nature, correct? I mean, they
 12 were specified and it was what Prodigy dictated?
 13 A Our kiosk could talk to many different types of
 14 computers. It could talk to specific services
 15 like OAG or it could talk to a service like
 16 Prodigy which could talk to anything else that
 17 Prodigy could talk to. And in 1993, Prodigy was
 18 an on-line service that accessed a lot of
 19 different computers, essentially what we know as
 20 the internet today.
 21 Q So you are saying that in 1993 Prodigy accessed a
 22 network of computers that is the same as what we
 23 consider the internet to be today?
 24 A No. What I'm saying is in 1993 Prodigy was a
 25 public access to information that was stored on

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1 computers all across the country. And they may
 2 have used these protocols, that we now
 3 colloquially call the internet today. So a user
 4 at our kiosk could access Prodigy and from Prodigy
 5 they could access other services that were not
 6 stored on Prodigy, just like today a user could
 7 access America On-Line and then go out over the
 8 web to get information from other terminals. In
 9 1993, nobody knew what the internet was and so
 10 essentially we provided access to what became
 11 commonly known as the internet.
 12 Q And one of the things you said is that they may
 13 have had or may have used these connections,
 14 correct?
 15 A Correct. I said that, but I don't have knowledge
 16 of how Prodigy architected their backbone or their
 17 systems.
 18 MR. POLASEK: Okay. That is fine. Do
 19 you have any more?
 20 MR. STITT: No.
 21
 22
 23
 24
 25

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1 (Witness excused.)
 2
 3
 4 JOHN F. MURPHY
 5 Subscribed and sworn to before me this _____
 6 day of _____, 19 ____.
 7 My commission expires _____
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 10 Notary Public within and for
 11 _____
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 22 Mettke, Richard P. vs. TouchNet Information Systems
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